

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SHAWN COLLINS,
Petitioner,

V.

KEITH SMITH, Warden,
Mansfield Correctional Institution,

Respondent.

CASE NO.: 1:09CV347

JUDGE DONALD C. NUGENT

Magistrate Judge George J. Limbert

REPORT AND RECOMMENDATION

On January 23, 2009, Petitioner Shawn Collins (“Petitioner”) filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254. ECF Dkt. #1. The matter has been fully briefed. ECF Dkt. ## 1, 9, 16. On September 16, 2010, Petitioner filed a motion seeking to voluntarily dismiss his petition. ECF Dkt. #17. Petitioner has indicated that Respondent has no objection. *Id.*

Petitioner's motion has not been signed. ECF Dkt. #17. Further, Petitioner states that he does not anticipate that the Court will "issue for an Order 'without prejudice.'" *Id.* Thus it appears that Petitioner is not specifically seeking a dismissal without prejudice. Therefore, the Court should determine whether it is appropriate to dismiss the instant petition with prejudice or without prejudice.

The undersigned recommends that the Court dismiss the instant petition without prejudice because it is unclear if Petitioner has any other motions pending, and Petitioner has not briefed the issue of equitable tolling. Therefore, at this stage, it would be difficult for the Court to conclude that a subsequently filed petition would be time barred. However, the undersigned notes Respondent's contention that the AEDPA statute of limitations expired in this case on October 26, 2009. ECF Dkt #9 at 14. Further, a "federal habeas petition does not toll § 2244(d)(1)'s limitation period." *Lawrence v. Florida*, 127 S.Ct. 1079, 1089 (2007).

Additionally, the undersigned notes that Petitioner indicated that he personally contacted Respondent, who has “expressed absolutely no objections towards him dismissing his petition.” ECF Dkt. #17. Respondent has since filed a brief indicating that he received no such correspondence from Petitioner, but he has no objection to Petitioner’s request to dismiss the instant petition.

For the foregoing reasons, the undersigned recommends that the Court GRANT Petitioner’s motion and DISMISS the instant petition WITHOUT PREJUDICE if Petitioner files a signed copy of the motion. ECF Dkt. #17. The Clerk’s Office is instructed to attach a copy of Petitioner’s motion to this Report and Recommendation and to mail a copy of both documents to Petitioner. ECF Dkt. #17.

Date: September 20, 2010

/s/George J. Limbert
GEORGE J. LIMBERT
UNITED STATES MAGISTRATE JUDGE

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Court within fourteen (14) days of service of this notice. Fed. R. Civ. P. 72; L.R. 72.3. Failure to file objections within the specified time WAIVES the right to appeal the Magistrate Judge’s recommendation. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).